90-710

No.

Supreme Court, U.S.
FILED
NOV 1 1990
JOSEPH F. SPANIOL, JR.
CLERK

In the Supreme Court

OF THE

United States

OCTOBER TERM, 1990

ST. PAUL FIRE AND MARINE INSURANCE COMPANY,
Petitioner,

VS.

SUPERIOR COURT OF THE STATE OF CALIFORNIA
FOR THE CITY AND COUNTY OF SAN FRANCISCO,
Respondent.

On Petition for Writ of Certiorari to the Supreme Court of California

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED FOR REVIEW

This Petition arises under the Miller Act, 40 U.S. Code § 270 subsections (a) and (b), which provide, *inter alia*, for the general contractor's providing a payment bond for subcontractors and materialmen involved in the construction of United States government public works. It further provides, under 40 U.S.C. § 270(b), that suits on said bond shall be brought in the United States District Courts and not elsewhere.

This Petition thus presents the following question of federal jurisdiction under the Miller Act:

> Does the Superior Court of the State of California have jurisdiction over the subject matter of an action on such a bond where the plaintiffs additionally allege a violated agreement not to plead the statute of limitations and bad faith and fraudulent breach of such an agreement?

THE PARTIES

Your petitioner, defendant below, is St. Paul Fire and Marine Insurance Company, a Minnesota corporation. The parent corporation of St. Paul Fire and Marine Insurance Company is St. Paul Companies, Inc., a Minnesota corporation. St. Paul Fire and Marine Insurance Company has no subsidiaries.

Respondent is the Superior Court of the State of California for the City and County of San Francisco.

Real parties in interest and plaintiffs are James Lee Jones; Far West Painting and Construction; and Percell-Jones Construction. Their capacities have never been averred.

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No.

In the Supreme Court

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OCTOBER TERM, 1990

ST. PAUL FIRE AND MARINE INSURANCE COMPANY,
Petitioner,

VS.

SUPERIOR COURT OF THE STATE OF CALIFORNIA
FOR THE CITY AND COUNTY OF SAN FRANCISCO,
Respondent.

On Petition for Writ of Certiorari to the Supreme Court of California

PETITION FOR WRIT OF CERTIORARI

St. Paul Fire and Marine Insurance Company, a Minnesota Corporation, petitions for a writ of certiorari to review the judgment of the California Superior Court, City and County of San Francisco, Department Number Nine, as to which review was denied by the California Court of Appeal and the California Supreme Court.

OPINIONS BELOW

The rulings of the Supreme Court, Court of Appeal and trial court have not been published. The orders, all entered without opinion, appear as Items 1, 2, and 3 in the Appendix, pp. A-1, A-2, A-3.

JURISDICTION

The judgment sought to be reviewed was entered by the California Supreme Court on September 19, 1990. There has been no proceeding or order for rehearing and no extension of time in which to petition for certiorari.

Jurisdiction is founded upon 28 U.S. Code § 1257(a) in that all state courts below have held that they have jurisdiction in spite the clear wording of the Miller Act, 40 U.S. Code § 270(b), to the contrary. This, in effect, is a holding drawing in question the validity of a statute of the United States and holding invalid petitioner's immunity from suit on a Miller Act bond in state court as provided by said statutory section.

Interlocutory rulings of the highest court of a state on the issue of subject matter jurisdiction are final judgments for purposes of review by this court. *Madruga v. Superior Court* 347 U.S. 556, 74 S.Ct. 298, 98 L.Ed.290 (1954); *Bandini Petroleum Co. v. Superior Court* 284 U.S. 8, 14-16, 52 S.Ct. 103, 76 L.Ed. 36 (1931); *Local No. 438 Construction and General Labor Union, AFL-CIO v. Curry* 371 U.S. 542, 546-552, 9 L.Ed.2d 514, 83 S.Ct. 531 (1963). The sole issue in the appellate court below was the jurisdiction of the court over the subject matter of the case and this case falls squarely within the rule of the cited cases.

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

The case involves the provisions of the Miller Act, 40 U.S. Code § 270a and § 270b. (App. A-7.)

STATEMENT OF THE CASE

This case arises upon the pleadings and the court's denial of petitioner's motion to dismiss, supported by declarations, for lack of subject matter jurisdiction. In their second amended complaint, real parties in interest allege, in what petitioner contends is artful pleading to avoid the allegation that the bond in suit is a Miller Act bond, as follows:

A. The status of defendant St. Paul Fire and Marine Insurance Company (hereinafter referred to as "St. Paul") as an insurer.

B. The existence of fictitious defendants.

C. The mutual agency of the defendants.

As a first cause of action plaintiffs allege:

1. Feinstein Construction Company, defendant's principal, entered into a construction contract with the United States Navy and provided a payment bond from defendant. Plaintiffs as subcontractors are third party beneficiaries of the bond.

2. At all relevant times the bond was in effect and plaintiffs had complied with their subcontracts.

3. Defendants had superior knowledge regarding payment bonds and related matters including the statute of limitations and were a fiduciary with regard to plaintiffs.

4. Defendant's principal failed to pay plaintiffs and filed bankruptcy.

5. Defendants denied plaintiffs' claim on August 9, 1984, and said denial was wrongful.

6. Thereafter, plaintiffs told defendant that only a portion of the claim was disputed and demanded payment of the undisputed portion. Defendant told plaintiffs it would reconsider the claim when the disputed portion was resolved by an investigation by the United States, and the parties made an oral agreement that defendant would not plead the statute of limitations.

7. In February 1989, the dispute was still not resolved and plaintiffs again made demand on defendant, but defendant cited the statute of limitations and refused to pay.

8. Plaintiffs' alleged damage in the amount due under the bond by reason of defendant's breach of its agreement.

9. Plaintiffs' performance of all conditions of the agreement.

The second cause of action alleges:

1. The parties made an oral contract whereby plaintiffs would refrain from pursuing a cause of action under the bond in return for defendant's reconsideration of the claim at a later point.

2. The implication in such a contract of a covenant of good faith and fair dealing whereby defendant would not unfairly deny plaintiffs the benefits of the bond.

3. Plaintiffs were vulnerable and relied upon defendant's superior knowledge and the defendant stood in a fiduciary relationship.

4. Plaintiffs performed their obligations by refraining from further pursuit of their claims.

5. Defendant breached the obligation by failing to pay and urging the statute of limitations defense and by failure to investigate the claims and causing plaintiffs to incur litigation.

6. Simple compensatory damages in an amount equal to the benefits payable under the bond, plus interest.

7. Plaintiffs' physical and emotional distress.

8. Plaintiffs' incurring medical expenses.

9. Plaintiffs' loss of employment and income.

10. Plaintiffs' retaining of an attorney.

11. Defendant's conduct was despicable, fraudulent and was done with willful and conscious disregard of plaintiffs.

The third cause of action alleges:

1. The false representation by defendant to plaintiffs that it would not assert a statute of limitations defense.

2. The defendant in truth and in fact did not intend to reconsider the claims of the plaintiffs but to assert a statute of limitations defense.

3. The representations were made with the intent to defraud and lead the plaintiffs to act in the manner alleged.

4. Plaintiffs' ignorance of the falsity of the representations and in reliance thereof their refraining from the pursuit of their claims under the bond. The reliance was justified because of the fiduciary relationship.

5. Plaintiffs, because of the fiduciary relationship, were never aware of any facts that made plaintiffs suspicious.

6. The acts of the defendant were intentional and deliberate.

7. Plaintiffs' compensatory damage is equal to the benefits payable under the bond, plus interest thereon.

8. Plaintiffs' physical and emotional injury.

9. Plaintiff James Lee Jones' (hereinafter referred to as "Jones") medical expenses occasioned by the fraud.

10. Plaintiff Jones' loss of income and future loss of income.

11. The plaintiffs' need to retain attorneys.

12. The defendant's conduct was despicable, fraudulent and done with a conscious disregard of plaintiffs' rights.

It is hence apparent from the allegations that plaintiffs' basic compensatory damages are the benefits payable under the bond, plus interest; in addition, plaintiffs seek punitive damages and damages for emotional distress, personal injuries and attorneys' fees.

The answer of St. Paul to the second amended complaint constitutes a general denial and alleges the following affirmative defenses:

1. Lack of jurisdiction of the subject matter.

2. The statute of limitations.

3. Failure to state facts sufficient to constitute a cause of action.

4. Plaintiffs' damage, if any there be, was caused by their failure timely to file in the proper court.

5. Plaintiffs' damage, if any there be, was caused by their own negligence in failing properly to perfect their claim.

6. Plaintiffs' conduct in pressing the instant allegations in view of their failure to comply with the legal requirements to perfect their claim constitutes comparative bad faith.

7. Defendant's entitlement to a set-off for payment made to plaintiffs' suppliers, materialmen and subcontractors.

8. Defendant's entitlement to a set-off by reason of plaintiffs' default.

Defendant, after having demurred twice raising, *inter alia,* the jurisdictional defense, answered alleging lack of subject matter jurisdiction and moved to dismiss for lack of jurisdiction of the subject matter, supported by declarations establishing that the bond sued upon is a Miller Act bond. (App. A-4) The court nonetheless denied the motion to dismiss. (App. A-1.) From this order, petitioner sought a writ of mandate, prohibition or other relief in the California Court of Appeal. After briefing by the parties, the Court of Appeal on July 31, 1990, summarily denied the petition (App. A-2.) On August 9, 1990, petitioners filed a petition for review in the California Supreme Court which, after opposition and reply, was summarily denied on September 19, 1990. (App. A-3.) From this denial petitioner seeks review.

STATE OF PROCEEDINGS

Petitioner raised the federal jurisdictional issue in its initial demurrer to the original complaint which was sustained with leave to amend, in its demurrer to the first amended complaint which as to this issue was overruled, in its answer to the second amended complaint filed after the sustaining of defendant's demurrer on other issues, and by motion to dismiss for lack of jurisdiction of the subject matter, which was denied. This ruling, as to which the court of appeal and the Supreme Court denied relief, is the basis for the present petition for certiorari. There have been no further proceedings.

ARGUMENT

A. THE COURT LACKS JURISDICTION

1. Defendant has properly raised the jurisdictional issue in the trial court

A motion to dismiss for lack of jurisdiction is a proper way to raise the issue of the court's jurisdiction. 2 Witkin, *California Procedure*, Jurisdiction, Section 320 (3d Ed. 1985); *See, Estate of Crisler*, 97 Cal.App.2d 198, 199-200, 217 P.2 470 (1950); *Estate of Crisler*, 83 Cal.App.2d 431, 432-433, 188 P.2 772 (1948). Petitioner made such a motion in the trial court. The jurisdictional issue is hence properly before this court.

2. The court lacks jurisdiction of the subject matter of the first cause of action

Section 270(b) of the Miller Act (40 U.S.C. § 270(b) (amended 1959)) provides in pertinent part:

> (b) every suit instituted under this section shall be brought in the name of the United States for the use of the person suing, in the United States District Court for any district in which the contract was to be performed and executed *and not elsewhere*, irrespective of the amount in controversy in such suit . . . (Emphasis added.)

This language has been construed uniformly to provide that the United States District Courts have exclusive jurisdiction over a Miller Act claim against a surety. *United States to the Use and Benefit of Bryant Electric Co. v. Aetna Casualty and Surety Co.*, 297 F.2d 665, 667 (2nd Cir. 1962) (". . . 40 U.S.C. § 270(b) vests exclusive jurisdiction over suits on Miller Act bonds in the Federal Courts . . ."); *Koppers Company, Inc. v. Continental Casualty Company*, 337 F.2d 499, 500 (8th Cir. 1964) (". . . We are confronted here with the question of whether § 2(b) of the Miller Act, 40 U.S.C. § 270(b)(b) applies to a claimant's suit on a Capehart Act payment bond so as to vest jurisdiction of the action exclusively in the appropriate federal court and to deny it to the state court.") State courts are thoroughly without jurisdiction over the surety. *United States for the Use and Benefit of Harvey Gulf International Marine, Inc. v. Maryland Casualty Co.*, 573

F.2d 245, 247 (5th Cir. 1978) (State court lacks jurisdiction so that filing of suit in it did not toll the Miller Act statute of limitations); *Powers Systems, Inc. v. Stallings & McCorvey, Inc.*, 454 So.2d 736, 737 (Fla. App. 2 Dist. 1984). ("However, under the Miller Act, the surety cannot be named as a party in a state court action, is not permitted to intervene in the state court action, and is not bound by the state court judgment.") *Ukropina-Polich-Kral v. Superior Court*, 186 Cal.App.2d 299, 300-302, 8 Cal.Rptr. 692 (1960).

It seems clear that the compensatory damages sought in the first cause of action (and for that matter in the second and third causes of action) are based on the bond which real parties in interest do not deny was issued pursuant to the Miller Act, (*see also*, original and reply Declarations of Bruce Reed and within the exclusive jurisdiction of the United States District Court and not the state courts.

It is anticipated that plaintiffs will urge that they are pursuing an oral contract made under state law. Despite this contention, plaintiffs on each of their causes of action will have to prove the Miller Act bond, that they furnished labor and materials to Feinstein Construction Company, petitioner's principal, and they have not been paid. These are Miller Act issues. What plaintiffs allege, however, is an agreement between the parties that plaintiffs would forebear from filing suit while the government was investigating the claim, in return for St. Paul's alleged reconsideration of the claim and agreement not to plead the statute of limitations. Under very similar allegations, courts have indicated that the court's jurisdiction was based on the Miller Act. *United States for the Use of E. E. Black Limited v. Price MacNamar Construction Co.*, 320 F.2d 663, 664-666 (9th Cir. 1963) ("This is a suit . . . brought pursuant to the Miller Act 40 U.S.C. § 270(a)"); *United States for the Use of Nelson v. Reliance Insurance Co.*, 436 F.2d 1366, 1367, 1370 (10 Cir. 1971) ("The problem that first confronts us is whether, in the Miller Act suit, a surety may be estopped from defending on the ground that the action was not commenced within the time specified in 40 U.S.C. § 270b(b)"). Cf., *United States for the Use of Texas Bitulithic*

Co. v. Fidelity and Deposit Co. of Maryland, 813 F.2d 697, 700 (5th Cir. 1987).

Since, on the basis of the authorities cited above, a finding of jurisdiction under the Miller Act is necessarily a finding of exclusive federal jurisdiction in the federal courts, these cases also hold implicitly that state courts have no jurisdiction over allegations of an agreement not to assert the statute of limitations on a Miller Act claim.

Furthermore, the statute of limitations in 40 U.S. Code § 270(b) is a federal statute of limitations and the computation of the limitations period, including what will toll it, is a question of federal law. *United States for the Use and Benefit of Harvey Gulf International Marine, Inc. v. Maryland Casualty Co.* 573 F.2d 245, 247 (5th Cir. 1978); *United States for the Use and Benefit of Bernard Lumber v. Lanier-Gervais* 896 F.2d 162, 164 (5th Cir. 1990) ***The contention that a contract not to assert the statute of limitations is a state law contract is hence erroneous and the contract is specifically subject to the Miller Act and exclusive federal jurisdiction.***

Petitioner did not waive its jurisdictional objection by failure to remove to federal court, as real parties in interest contended below. Jurisdiction cannot be conferred by consent, or waiver or estoppel. *Louisville and Nashville Railroad Company v. Mottley* 211 U.S. 149, 151, 29 S.Ct. 42, 53 L.Ed. 126 (1908); *Bender v. Williamsport Area School District* 475 U.S. 534, 541, 89 L.Ed. 2d 501, 106 S.Ct. 1326 (1986); *Summers v. Superior Court*, 53 Cal. 2d 295, 298, 1 Cal.Rptr. 324, 347 P.2d 668 (1959). Furthermore, if removal would cure the jurisdictional defect, 28 U.S.C. 1441c (as amended 1988), it would follow that without removal the jurisdictional defect remains. Real parties' in interest contention raised below ignores this rule.

3. The court lacks jurisdiction over the subject matter of the second and third causes of action

It has been seen that the calculation of the limitations period including what tolls it is a federal question arising under the Miller Act so that these causes of action alleging a contract not to plead the statute of limitations under the Miller Act are exclu-

sively federal. *United States to the Use and Benefit of Harvey Gulf International Marine, Inc. v. Maryland Casualty Co.* 573 F.2d 245, 247 (5th Cir. 1978); *United States for the Use and Benefit of Bernard Lumber v. Lanier-Gervais* 896 F.2d 162, 164 (5th Cir. 1990).

Alternatively, the second and third causes of action are each premised upon plaintiffs' having a valid claim payable under the bond. (Second cause of action, paragraphs 20, 25; third cause of action, paragraphs 33, 38.) Under both causes of action, plaintiffs to prevail will have to prove the Miller Act bond, that they provided materials to petitioner's principal Feinstein Construction Company, and that they are unpaid. These are Miller Act issues and the exclusive determination of such issues, it has been seen above, is in the United States District Court. **It should be noted that this court has never decided whether claims of the nature of those set forth in the second and third causes of action may be asserted by Miller Act claimants.** It is unnecessary to decide this issue because if there is no right to make such claims, plaintiffs' action is a pure Miller Act action and if there is such a right, the jurisdiction lies exclusively with the United States District Court. Lower court authority on this issue is illuminating. In *K-W Industries v. National Surety Corp.*, 855 F.2d 640 (9th Cir. 1988) and *Alvarez v. Insurance Co. of North America*, 667 F.Supp. 689 (N.D. Cal. 1987), the court allowed a state law bad faith action *subsequent to the resolution of a federal court Miller Act action.*[1] That this distinction is important is shown by the *Alvarez* case where the court initially dismissed a bad faith claim filed with the Miller Act claim in federal court on the grounds that such relief was not available under the Miller Act and allowed the bad faith

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[1] The opinion in *K-W Industries v. National Surety Corp.* 855 F.2d 640 (9th Cir. 1988) was very sharply criticized in *United States of America for the Use of Pensacola Construction Co. v. St. Paul Fire and Marine Insurance Company* 710 F.Supp. 638 (W.D. La. 1989), the court pointing out that the venue requirement of the Miller Act 40 U.S.C. § 270(b) was designed to protect the surety from suits in multiple jurisdictions such that its liability would exceed the face amount of the bond. This reasoning compels the results sought by petitioner in this proceeding.

claim only after resolution of the Miller Act claim. *Id.* at 690-691. This is not a coincidence. If, for example, actions like those alleged in the second and third causes of action were allowed to be brought in state court before a determination of Miller Act liability in federal court, under state law in all probability they would be conclusive of the federal issue and, hence, subversive of the exclusive jurisdiction of the district court over Miller Act cases. Additionally, since the federal courts will presumably not recognize such determination, there could be a multiplicity of litigation with conflicting results.

CONCLUSION

For the reasons stated, there is a clear conflict between the ruling of the California Supreme Court in this case and the cited opinions of the Courts of Appeal on a federal question. The petition for certiorari should be granted and the court should order the respondent superior court to dismiss the case for lack of subject matter jurisdiction.

DATED: October 29, 1990

Respectfully submitted,

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Appendix A

California Superior Court
City And County Of San Francisco
Department Number Nine
No. 860-196

James Lee Jones; George Edward Wilson;
Far West Painting and Construction;
and Percell-Jones Construction,
Plaintiffs,

vs.

St. Paul Fire and Marine Insurance
Company and Does 1 to 100 inclusive,
Defendants.

[Filed April 17, 1990]

ORDER RE MOTION TO DISMISS

Defendant St. Paul Fire and Marine Insurance Company's motion to dismiss, heretofore submitted, is denied.

Plaintiffs' request for sanctions under Code of Civil Procedure section 1008 is denied.

DATED: April 16, 1990.

IRA A. BROWN, JR.
Ira A. Brown, Jr. /s/
Judge of the Superior Court

Appendix B

Court Of Appeal Of The State Of California
In And For The
First Appellate District
Division: 5

St. Paul Fire & Marine Ins. et al.,

vs.

Superior Court, San Francisco County
Jones, James Lee et al.,
A049489
San Francisco County No. 860196

[Filed July 31, 1990]

By The Court:

The petition for writ of mandate or prohibition is denied.

Dated: July 31, 1990.

LOW, P.J.

(Before Low, P.J., King, J. and Haning, J.)

Appendix C

Order Denying Review
After Judgment By The Court Of Appeal

First Appellate District,
Division Five, No. A049489
S016973

In the Supreme Court
of the
The State of California

In Bank

St. Paul Fire and Marine Insurance Co.,
Petitioner,

v.

San Francisco County Superior Court,
Respondent,

James Lee Jones, et al.,
Real Parties In Interest.

Petition for review DENIED.

LUCAS
Chief Justice

Appendix D

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Superior Court of the State of California
County of San Francisco

James Lee Jones; George Edward Wesson;
Far West Painting and Construction; and
Percell-Jones Construction,
Plaintiffs,

vs.

St. Paul Fire and Marine Insurance Company; and
Does 1 to 100, inclusive,
Defendant.

[Filed Dec 27 1989]

Case No. 860 196

Notice of Motion and Motion to Dismiss for Lack of Jurisdiction Over the Subject Matter

Date: January 26, 1990
Time: 9:30 a.m.
Dept: 9
Trial Date: Not Set.

To Each Party of Record and to the Attorneys of Record for Each Said Party:

NOTICE IS HEREBY GIVEN that on the 26th day of January, 1990, at 9:30 a.m. or as soon thereafter as the matter can be heard in Department 9 of the Court, City Hall, San Francisco, California 94102, the undersigned attorneys for defendant St.

Paul Fire and Marine Insurance Company will move the Court for an order dismissing the second amended complaint and action for lack of jurisdiction of the subject matter, on the grounds that the action is one under the Miller Act, 40 U.S.C. § 270a *et seq.* and exclusive jurisdiction lies in the United States District Court.

Said motion will be based upon the entire record and file in this matter, the present notice of motion, motion and memorandum of points and authorities and declarations of Bruce Reed and Peter V. Shackter filed herewith.

DATED: December 27, 1989

McCARTHY, FLOWERS & ROBERTS

By: PETER V. SHACKTER
Peter V. Shackter
Attorneys for Defendant
St. Paul Fire & Marine
Insurance Company

Proof of Service by Mail

I declare that I am employed in the City and County of San Francisco, California.

I am over the age of eighteen years and not a party to the within entitled action. My business address is One California Street, Suite 2750, San Francisco, California 94111.

I am readily familiar with McCarthy, Flowers & Roberts' practice for collection and processing of correspondence for mailing with the United States Postal Service.

On December 27, 1989, I served the attached NOTICE OF MOTION AND MOTION TO DISMISS FOR LACK OF JURISDICTION OVER THE SUBJECT MATTER on the following in said cause, by placing it for deposit with the United States Postal Service on this day, in the ordinary course of business, a true copy thereof enclosed in a sealed envelope. The envelopes were addressed as follows:

Patrick E. Catalano, Esquire
Law Offices of Patrick E. Catalano
One Maritime Plaza, Suite 2250
San Francisco, California 94111

Michael J. Guglielmino, Esquire
Williams & Martinet
150 Spear Street, Suite 110
San Francisco, California 94105

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct, and that this Declaration was executed at San Francisco, California, on December 27, 1989.

VANESSA S. HADADY
Vanessa S. Hadady

Appendix E

The Miller Act

§ 270a. Bonds of contractors of public buildings or works

(a) Type of bonds required

Before any contract, exceeding $25,000 in amount, for the construction, alteration, or repair of any public building or public work of the United States is awarded to any person, such person shall furnish to the United States the following bonds, which shall become binding upon the award of the contract to such person, who is hereinafter designated as "contractor":

(1) A performance bond with a surety or sureties satisfactory to the officer awarding such contract, and in such amount as he shall deem adequate, for the protection of the United States.

(2) A payment bond with a surety or sureties satisfactory to such officer for the protection of all persons supplying labor and material in the prosecution of the work provided for in said contract for the use of each such person. Whenever the total amount payable by the terms of the contract shall be not more than $1,000,000 the said payment bond shall be in a sum of one-half the total amount payable by the terms of the contract. Whenever the total amount payable by the terms of the contract shall be more than $1,000,000 and not more than $5,000,0000, the said payment bond shall be in a sum of 40 per centum of the total amount payable by the terms of the contract. Whenever the total amount payable by the terms of the contract shall be more than $5,000,000 the said payment bond shall be in the sum of $2,500,000.

(b) Waiver of bonds for contracts performed in foreign countries

The contracting officer in respect of any contract is authorized to waive the requirement of a performance bond and payment bond for so much of the work under such contract as is to be performed in a foreign country if he finds that it is impracticable for the contractor to furnish such bonds.

§ 270b. Rights of persons furnishing labor or material

(a) Every person who has furnished labor or material in the prosecution of the work provided for in such contract, in respect of which a payment bond is furnished under sections 270a to 270d of this title and who has not been paid in full therefor before the expiration of a period of ninety days after the day on which the last of the labor was done or performed by him or material was furnished or supplied by him for which such claim is made, shall have the right to sue on such payment bond for the amount, or the balance thereof, unpaid at the time of institution of such suit and to prosecute said action to final execution and judgment for the sum or sums justly due him: *Provided, however,* That any person having direct contractual relationship with a subcontractor but no contractual relationship express or implied with the contractor furnishing said payment bond shall have a right of action upon the said payment bond upon giving written notice to said contractor within ninety days from the date on which such person did or performed the last of the labor or furnished or supplied the last of the material for which such claims is made, stating with substantial accuracy the amount claimed and the name of the party to whom the material was furnished or supplied or for whom the labor was done or performed. Such notice shall be served by mailing the same by registered mail, postage prepaid, in an envelop addressed to the contractor at any place he maintains an office or conducts his business, or his residence, or in any manner in which the United States marshal of the district in which the public improvement is situated is authorized by law to serve summons.

(b) Every suit instituted under this section shall be brought in the name of the United States for the use of the person suing, in the United States District Court for any district in which the contract was to be performed and executed and not elsewhere, irrespective of the amount in controversy in such suit, but no such suit shall be commenced after the expiration of one year after the day on which the last of the labor was performed or material was

supplied by him. The United States shall not be liable for the payment of any costs or expenses of any such suit.

(Aug. 24, 1935, c. 642, § 2,49 Stat. 794; Aug. 4, 1959, Pub.L. 86-135, § 1, 73 Stat. 279.)

(c) Authority to require additional bonds

Nothing in this section shall be construed to limit the authority of any contracting officer to require a performance bond or other security in addition to those, or in cases other than the cases specified in subsection (a) of this section.

(d) Coverage for taxes in performance bond

Every performance bond required under this section shall specifically provide coverage for taxes imposed by the United States which are collected, deducted, or withheld from wages paid by the contractor in carrying out the contract with respect to which such bond is furnished. However, the United States shall give the surety or sureties on such bond written notice, with respect to any such unpaid taxes attributable to any period, within ninety days after the date when such contractor files a return for such period, except that no such notice shall be given more than one hundred and eighty days from the date when a return for the period was required to be filed under Title 26. No suit on such bond for such taxes shall be commenced by the United States unless notice is given as provided in the preceding sentence, and no such such suit shall be commenced after the expiration of one year after the day on which such notice is given.

(Aug. 24, 1935, c. 642, § 1, 49 Stat. 793; Nov. 2, 1966, Pub.L. 89-719, Title I, § 105(b), 80 Stat. 1139; Nov 2, 1978, Pub.L. 95-585, 92 Stat. 2484.)

Supreme Court, U.S.
FILED
DEC 5 1990
JOSEPH F. SPANIOL, JR.
CLERK

(2)

No. 90-710

In The

Supreme Court of the United States

October Term, 1990

ST. PAUL FIRE AND MARINE INSURANCE COMPANY,

Petitioner,

vs.

SUPERIOR COURT FOR THE STATE OF CALIFORNIA FOR THE CITY AND COUNTY OF SAN FRANCISCO,

Respondent.

Petition For Writ Of Certiorari To The Supreme Court Of California

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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OR CALL COLLECT (402) 342-2831

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ARGUMENT

I

THE CALIFORNIA STATE COURTS HAVE JURISDICTION OVER THE SUBJECT MATTER OF THE ACTION

Implicit in the argument of St. Paul Fire and Marine Insurance (hereinafter referred to as St. PAUL), and stated explicitly in its "Questions Presented for Review" are the false premises that this suit is instituted under the Miller Act, 40 U.S.C. §270a et seq., and that the Plaintiffs are seeking to recover benefits under a bond. This action is not instituted under the Miller Act and the Plaintiffs are not seeking to recover benefits under a bond. Rather they are seeking to recover damages through state court causes of action for breach of contract; breach of covenant of good faith and fair dealing, and fraud and conspiracy to defraud. The damages sought by those causes of action are clearly not, as St. PAUL contends, the same as those that would flow from an action on a bond. The authorities agree that such state causes of action are separate and distinct from a Miller Act claim against a surety.

In the recent case of *K-W Industries v. National Surety Company*, (9th Cir. 1988) 855 Fed. 2d 640, K-W Industries (hereinafter "K-W"), the subcontractor, made a claim for payment against the surety on a Miller Act bond. When the surety refused to pay the claim K-W brought an action on the bond in the United States District court.

K-W then also instituted a separate action in the state court alleging that the surety acted in bad-faith in refusing to pay its claim, whereupon the surety removed the

action to the federal court on the basis of diversity jurisdiction. The district court then *sua sponte* dismissed the action for lack of subject matter jurisdiction.

In so dismissing the case the district court reasoned that although K-W plead its claim against the surety as founded upon state law, the claim was properly characterized as a federal claim predicated on the rights conferred upon K-W by the Miller Act. Applying law which has now been superseded, the court reasoned further that as the federal court's removal jurisdiction is derivative, the state court's lack of jurisdiction also deprived the federal court of jurisdiction.

On appeal, the surety argued that state law subjecting sureties to tort liability for bad faith insurance practices conflicted with the purposes of the Miller Act, one of which was to protect Miller Act sureties from diverse state regulation, and that the application of state bad-faith laws were thus preempted. The court, however, disagreed:

> 'The purpose of the Miller Act "is to protect persons supplying materials and labor for federal projects." *United States ex rel. Martin Steel Constructors, Inc. v. Avanti Constructors, Inc.*, 750 F.2d 759, 761 (9th Cir. 1984), cert. denied, 474 U.S. 817, 106 S.Ct. 60, 88 LEd 2d. 49 (1985).' [pp. 642, 643].

The court went on to hold that:

> 'We agree with the tenth circuit's observation that the Miller Act, like the mechanic's lien it replaces, "is not the exclusive remedy in regard to the obligation which such lien secures," but rather, "is 'separate from and independent of any *in personam* rights . . . which the supplier

> might have against the owner, a contractor, or subcontractor, by way of a contract or otherwise.' " *United States ex rel. Sunworks Division of Sun Collector Corp. v. Insurance Company of North America*, 695 F. 2d 455, 458 (10th Cir. 1982) (quoting *In re Scherer Hardware & Supply, Inc.*, 9 B.R. 125, 130 (N.D. ILL. 1981). For the purpose of preemption analysis, we see no reason to distinguish between remedies that a supplier may have against an owner, contractor, or subcontractor as opposed to a surety.'
>
> [. . .]
>
> **"because K-W's action arises under state law, not under the Miller Act, the [. . .] state court in which this action was originally filed has subject matter jurisdiction.** The district court thus erred in dismissing the action for lack of removal jurisdiction." [pp. 643, 644]. [Bold emphasis added].

In the similar case of *Alvarez v. Insurance Company of North America*, (1987 N.D. Cal.) 667 F. Supp. 689, the plaintiff was a subcontractor to Feinstein Construction, the bonded general contractor (coincidentally the same contractor as in the present case). The Insurance Company of North America (hereinafter "INA") issued the Miller Act Bond covering the project. The plaintiff sued Feinstein and INA in federal court both to recover under the Miller Act bond and for bad faith under California law. The bad faith action was dismissed on the ground that such relief was not available under the Miller Act.

After an arbitration award and in response to the large number of claims on the Feinstein bond INA filed an interpleader action, depositing the amount of the bond. Having recovered only a pro rata share of its claim

under the bond the plaintiff then reasserted its bad faith claim in the Superior Court of California.

INA then removed the action to federal court on diversity grounds where it argued that a Miller Act surety is not subject to regulation under the California Insurance code and that the state insurance regulations were preempted by the Miller Act. The court found otherwise holding that:

> "Allowing a bad faith suit outside of the Miller Act does not interfere with the desired uniformity of remedy *under* the Act. Nor does a congressional purpose of providing a uniform remedy imply that such a remedy was to be exclusive." [p. 693].
>
> "In this case, [the plaintiff] has brought a separate action for unfair insurance practices under state statute. In other words, rather than asking this court to expand the federal remedy, plaintiff brings an additional but separate state claim." [p. 694].
>
> "The operation of the Miller Act and various authorities support the conclusion that the Miller Act does not totally occupy the field. For example, a Miller Act suit on the surety bond is not a subcontractor's exclusive remedy." [p. 695 citations omitted].

The foregoing authorities make an absolute distinction between actions on the bond and the additional but separate state court remedies which the respondents have plead in this action. The Court's attention is also drawn to the fact that the action on the bond was determined by an arbitrator outside both the state and federal court systems and not, as St. PAUL contends on page 10 of its Petition, "in federal Court".

II

ALTHOUGH PETITIONER MAY BE ESTOPPED IN FEDERAL COURT FROM ASSERTING THE STATUTE OF LIMITATIONS ON THE MILLER ACT BOND THE STATE COURT IS NOT THEREBY DIVESTED OF JURISDICTION OVER THE STATE CAUSES OF ACTION

St. PAUL does not appreciate that the damages which flow from its breach of contract are not identical to the benefits under the Miller Act bond and that the suit is not "on the bond", as discussed above. Nor does it appreciate that the Plaintiffs are not asserting an estoppel argument in such an action but rather their separate and independent *in personam* rights. On page 8 of the Petition, St. PAUL has cited the cases of *United States for the Use of E.E. Black Limited v. Price MacNamar Construction Co.*, (9th Cir. 1963) 320 F.2d 663; *United States for the Use of Nelson v. Reliance Insurance Co.*, (10th Cir. 1971) 436 F.2d 1366 and *United States for the Use of Texas Bitulithic Co. v. Fidelity and Deposit Co. of Maryland*, (5th Cir. 1987). These authorities indicate that the federal court will retain jurisdiction over an action instituted under 40 USC §270(b) on a Miller Act bond where there is an indication that a surety may be estopped from asserting the statute of limitations. They do not indicate, however, and neither does it follow, that exclusive jurisdiction over the state causes of action is thereby conferred upon the federal court, as would appear to be implicitly contended by St. PAUL.

III

THE COMPUTATION OF THE LIMITATION PERIOD UNDER 40 USC §270(b) IS NOT AN ISSUE BEFORE THE CALIFORNIA STATE COURTS

On page 9 of its Petition, St. PAUL contends that the statute of limitations in 40 USC §270(b) is a federal statute of limitations and that the computation of the limitations period, including what will toll it, is a question of federal law. There is, however, no dispute between Plaintiffs and St. PAUL in this regard so that the issue is not one before the state courts.

The Plaintiffs have made no allegations concerning the computation of the limitation period nor that it is tolled. A contract not to assert a statute of limitations defense is breached by the assertion of such a defense, whensoever asserted. The computation of the limitation period will be of no relevance, therefore, to the state court's consideration of St. PAUL's breach of contract.

IV

THE EXISTENCE OF A MILLER ACT BOND IS NOT AN ISSUE BEFORE THE CALIFORNIA STATE COURTS

Contrary to the assertions of St. PAUL, the Plaintiffs will not even have to prove the existence of a Miller Act bond as St. PAUL, itself, has consistently averred the existence of such a bond. (See declaration of Bruce Reed in support of St. PAUL's Motion to Dismiss for Lack of Subject Matter Jurisdiction, attached hereto as Exhibit 1). The question as to the existence of the bond will not, therefore, be considered by the state court.

V

HAVING WAIVED ITS RIGHT TO REQUEST REMOVAL TO FEDERAL COURT THE PETITIONER CANNOT BE PERMITTED TO CONTEND THAT THE STATE COURT LACKS JURISDICTION

The federal courts previously followed the "derivative jurisdiction rule" which provided that where the state court had no subject matter jurisdiction because the claim was within the exclusive federal jurisdiction, the federal court to which the action was removed could derive none. (*Emrich v. Touche Ross & Co.*, (9th Cir. 1988) 846 F.2d 1190). The "derivative jurisdiction" rule was eliminated in 1986. 28 USC §1441(e) now provides that removal jurisdiction "is not precluded [. . .] because the state court from which such civil action is removed did not have jurisdiction over the claim." The rule now only applies to state court actions filed before its enactment on June 19, 1986. (*Emrich v. Touche Ross & Co., supra*). In the transcript of the Superior Court proceedings of March 29, 1990 at page 3, lines 18-19, counsel for the Petitioner can be seen to be under the mistaken impression that the "derivative jurisdiction" rule is applicable to this action. The present action was commenced on June 24, 1986 by the filing of the Complaint in the California Superior Court (and process was served some time later) so that the "derivative jurisdiction" rule is not applicable. If, as St. PAUL contends, there is federal jurisdiction over this action it would not, therefore, have been precluded from removing the action to federal court.

A defendant waives the right to removal and submits to state court jurisdiction if it fails to file a notice of removal within 30 days after receipt of the first pleading

in the state action that sets forth a removable claim. (28 USC §1446(b)). St. PAUL has thus submitted to the jurisdiction of the California state courts.

The Petitioner contends, on page 9 of the Petition, that it did not waive its jurisdictional objection by failure to remove to federal court as jurisdiction cannot be conferred by waiver. While it is agreed that jurisdiction is not *conferred* by waiver this is clearly not the same as a submission to jurisdiction. The fact remains that St. PAUL, by its failure to file the required notice of removal under 28 USC §1446(b), has, by waiver, submitted to state court jurisdiction. To hold otherwise would be to render the provisions of this section without effect. St. PAUL's submission to the state court's jurisdiction has, therefore, rendered moot its subsequent protestations thereto.

In its "Statement of the Case", St. PAUL has falsely accused the Respondents of "artful pleading". Notwithstanding, this would not affect the Petitioner's submission to state court jurisdiction by its failure to timely remove. In *Cantrell v. Great Republic Insurance Co.*, (9th Cir. 1989) 873 F.2d 1249, where the defendant could have known that the plaintiff's state claims were preempted by ERISA, notwithstanding the plaintiff's "artful pleading", the rule requiring removal within 30 days following receipt of the original complaint was enforced.

VI

THE COMPLAINT STATES NO CLAIM OVER WHICH THE FEDERAL COURTS HAVE JURISDICTION

As discussed above, the federal courts have exclusive jurisdiction over a claim on a Miller Act bond only when

the action is directly "on the bond". The latter two causes of action of the Complaint are premised on the first cause of action and not, as the St. PAUL alleges, on a claim payable under a bond. The Court's attention is drawn to page 10 of St. PAUL's Argument wherein it contends that paragraphs 20 and 25, and paragraphs 33 and 38, of the second and third causes of action respectively of the Second Amended Complaint are premised upon the plaintiffs having a valid claim under a bond. An examination of these paragraphs will reveal, however, that they are not so premised and that only state causes of action are being plead.

Because only state causes of action are being plead there is no claim over which the federal courts are able to independently acquire jurisdiction. (*Hunter v. United Van Lines*, (9th Cir. 1984) 746 F.2d 645, 649; *Aragon v. Federated Department Stores, Inc.*, (9th Cir. 1986) 750 F.2d 1447, 1457). It follows that the state courts not only have jurisdiction over the causes of action plead but that their jurisdiction is exclusive.

VII

CONCLUSION

St. PAUL's arguments are predicated upon the false premise that the action is instituted under Section 270(b) of the Miller Act (40 USC §270(b)). The authorities clearly distinguish between the non-exclusive remedy of an action instituted under 40 USC §270(b) and the independent state court proceedings of which the present action is but one example.

Even if the filing of the action in state court was incorrect, St. PAUL would, by its failure to file a timely notice of removal, have waived its right to assert federal jurisdiction and have submitted to state court jurisdiction. By their nature, the state causes of action are distinct from a claim instituted under the provisions of 40 USC §270(b) and are not, therefore, conclusive of a federal issue. Even if they were, St. PAUL's failure to file its notice of removal has ensured that there will be no conflicting outcome in federal court.

As argued, the state courts have exclusive jurisdiction over the causes of action plead. To grant St. PAUL's Petition would be to deny to the Plaintiffs a forum through which their grievances may be redressed. It is in the interests of justice and in accordance with established law that the Petition be denied.

Dated: November 30, 1990

Respectfully submitted,
WILLIAMS & MARTINET

By /s/ Michael J. Guglielmino
MICHAEL J. GUGLIELMINO
Attorneys for Plaintiffs and Real Parties in interest

APPENDIX

FREDERICK W. FLOWERS, ESQ.
PETER V. SHACKTER, ESQ.
MARK P. GRUNDMAN, ESQ.
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San Francisco, California 94111
Telephone: (415) 981-5130

Attorneys for Defendant
ST. PAUL FIRE & MARINE INSURANCE COMPANY

SUPERIOR COURT OF THE STATE OF CALIFORNIA

COUNTY OF SAN FRANCISCO

JAMES LEE JONES; GEORGE EDWARD WESSON; FAR WEST PAINTING AND CONSTRUCTION; and PERCELL-JONES CONSTRUCTION, Plaintiffs, vs. ST. PAUL FIRE AND MARINE INSURANCE COMPANY; and DOES 1 TO 100, inclusive, Defendant.	CASE NO. 860 196 REPLY DECLARATION OF BRUCE REED (Filed Jan, 29, 1990) Date: February 1, 1990 Time: 9:30 a.m. Place: Department 9 Trial Date: None Set

I, BRUCE REED, declare:

1. Reference is made to my declaration filed herein on December 27, 1989. I am the same declarant and I hereby incorporate said declaration by reference.

2. Attached hereto marked Exhibit "A" and hereby incorporated by reference is a true copy of a notice of bond amendment or cancellation with regard to bond number 400GW6738.

3. The purpose of the document is to show an addition to the face amount of the bond.

4. It is the regular course of business for the San Francisco office of St. Paul Fire and Marine Insurance to issue a notice of bond amendment when the face amount of a bond is in fact amended and to keep it in the file to memorialize the fact of the amendment.

5. The present notice of bond amendment was in fact so made by the San Francisco office and so kept in its file in the regular course of business.

6. On the right hand side of the document, in a space indicated "class code" appears the number 330.

7. Of my personal knowledge "330" indicates various types of construction bonds on public words owned by the United States of America and issued pursuant to the Miller Act, 40 U.S. Code §270 *et seq.*

8. Attached hereto as Exhibit "B" is a true copy of our file copy of a letter with enclosures in our file regarding a claim by Far West Paint and Construction and George Weston against bond 400GW6738.

9. Mr. Ron Mund the addressee of the letter, is of my personal knowledge, is in the bond claims department of St. Paul Fire and Marine Insurance Company in St. Paul, Minnessota.

10. J. W. Gilliland works in my office as bond field supervisor. I am familiar with Mr. Gilliland's handwriting and pages 1 and 4 of the documents appeared to be in his handwriting.

11. Of my personal knowledge, Mr. Wesson and one other man were in our office on or about February 8, 1989, and spoke with Mr. Gilliland about a claim.

12. It was the regular course of business of the San Francisco branch office to transmit to the claims department of the home office, in writing, any bond claims submitted to it and to file copies thereof as a record of the transmission and the documents comprising Exhibit "B" were in fact transmitted to the home office and a copy kept in the file in the regular course of business.

I declare under penalty or perjury under the laws of the State of California that the foregoing is true and correct.

This declaration was executed on the 26th day of January, 1990, at San Francisco, California.

/s/ Bruce Reed
Bruce Reed

EXHIBIT A

Property & Liability Insurance

NOTICE OF BOND AMENDMENT OR CANCELLATION

TYPE OF BOND (C) BOND NO. 400 GW 6738

PRINCIPAL: Feinstein Construction, Inc. and Neil D. Feinstein, Contractor

ADDRESS AND ZIP CODE:

OBLIGEE: U.S. Navy

ADDRESS AND ZIP CODE:

AGENCY NAME, ADDRESS & ZIP: R. L. Milsner, 2775 Mitchell Drive, Suite 211, Walnut Creek, CA 94598

AGENCY NUMBER: 045045

FORM OF COVERAGE (Fid. only):

MAJOR GROUP CODE:

METHOD: A. Continues Indefinitely; B. Expires Definitely - Use Renewal Cert.; C. Expires Definitely - New Bond Required; D. Term Bond - Term Premium; E. H.O. Responsibility

CLASS CODE (All Bonds): 330

DATE OF CHANGE: 8/19/85

PREMIUM PERIOD: FROM 3/16/84 TO 3/16/85

COMMISSION: 30%

FOR CONTRACT ONLY: ☐ Bond ☒ Min.

TYPE OF CONTRACT (Contract only): 4

SUPPLEMENTAL QUESTIONNAIRE

TRANSACTION DESCRIPTION

To Bill Overrun:
Final: 1,539,261.00
Orig.: 1,374,504.00
Over: 164,757.00
Rate: 5.25
A.P.: 865.00

ST. PAUL FIRE & MARINE INS. CO.
NO. CALIF. SERVICE CENTER
AUG 23 1985
JOHN W. DAVIS
BOND MANAGER
SAN FRANCISCO BRANCH OFFICE

1. Financial Folder
2. Original Eff. Date
3. Issuer: A ☐ C ☐ D ☒ 4. M/P Yes ☐ No ☐
5. Dur's No. 6. SIC 1542
7. Prem'l-Flat ☐ Short ☐ Pro-Rate ☐

ORIGINAL BOND/CONTRACT AMOUNT	AMOUNT CANCELLED	RETURN PREMIUM	AMOUNT ADDED	ADDITIONAL PREMIUM	REVISED BOND Size Code AMOUNT	REVISED BOND PREMIUM
1,374,504.00	ST. PAUL FIRE & MARINE INS. CO. NO. CALIF. SERVICE CENTER AUG 19 1985 THERESA L. GROSHONG, Bond Dept. SAN FRANCISCO BRANCH OFFICE		164,757.00	865.00	1,539,261.00	

13037 Rev. 8-81 Printed in U.S.A.

SERVICE CENTER COPY

BEST AVAILABLE COPY

EXHIBIT B

OFFICE MEMO

The St Paul

Date _____

From ST. PAUL FIRE & MARINE INS. CO. NO. CALIF. SERVICE CENTER

Dept. FEB 8 1989

Office JOHN GILLILAND, Bond Field Sup. SAN FRANCISCO BRANCH OFFICE

Address _____

TO: RON MUND
BOND CLAIMS

RE: FEINSTEIN CONSTRUCTION 400GW6738

Dear Ron,

George Wesson from Far West Printing & Construction came into our office today to make a claim on 400GW6738. He will be calling you in the morning about it.

Attached are the papers he left with me. He also indicated that the problems with the Navy and Davis-Bacon have been cleared up. Nancy Hernandez at San Bruno Navel Construction Facility has more information – I don't have a phone number.

The phone number for George Wesson is 453-9176.

/s/ John Gilliland

Sharada
CONSTRUCTION, INC.
LICENSED CONTRACTOR

June 12, 1986

Mr. G. William Tischer
The Tischer Company
201 Sansome Street
San Francisco, CA 94104

Dear Fellow BOMA Member:

Sharada Construction, Inc., as a new allied member, would like to introduce ourselves.

Knowing the quality that BOMA members expect, we would like to assist you with your building projects starting from the permit stage through the completion of the construction. Sharada Construction is a lean, innovative competitor in the construction industry specializing in commercial remodeling, tenant improvements, historical renovations, as well as, seismic upgrades. With this approach, our staff has achieved $6 million in business in the first half of 1986.

As our client, you can expect principal involvement and leadership in every project – unsurpassed quality assurance. We are looking forward to meeting and assisting you with any construction needs you may have.

Sincerely,

SHARADA CORPORATION, INC.

/s/ Neil D Feinstein
Neil D. Feinstein
President

NDF/mm

415•641•1792
3221 TWENTIETH STREET
SAN FRANCISCO
CALIFORNIA
94110

Grady Newberry
c/o St. Paul Fire and Marine Ins.
201 – 3rd Street
San Francisco – CA 94103

June 25, 1984.

Re: Bond #400GW6738 Feinstein Construction, Inc.

Dear Mr. Newberry:

The office of the contracting officer, located at the Concord Navel Weapons Station in Concord, California, has directed the undersigned to you for payment out of Bond #400GW6738 Feinstein Construction, Inc., as and for the following reasons:

As Subcontractor under said Feinstein's contract with the United States Navy, contract #N62474-82-C-D348, the undersigned did a demolition job on Bldg. IA-10 at said Concord Naval Weapons Station for Feinstein Construction, Inc.

Although the job has been completed and the United States Navy is totally satisfied with same; and although Feinstein has been invoiced and presented with said invoices by the undersigned, said Feinstein, even though they have themselves billed the United States Navy for said demolition job, has willfully failed, neglected and refused to pay the undersigned the sum of $68,000.00

which represents that amount still due and owing on said demolition job.

Enclosed herewith, and hopefully to expedite this matter, are the heretofore mentioned invoices.

Taking all of the aforesaid into consideration, NOTICE IS HEREBY GIVEN that the undersigned is herein making a formal request upon you for payment in the amount of $68,000.00 out of Bond #400GW6738 Feinstein Construction, Inc.

Thank you for your consideration and co-operation,

/s/ George Wesson

SHARADA

400GW6738

CONCORD NAVAL WEAPONS STATION
N62474-82-C-D348

FAR WEST CONSTRUCTION

Demand Two Years Ago

4-03-84 Origional Contract
68,000 + Claim.

George Wesson FAR WEST Painting & Construction.

453-9176

Nancy Hernandez, Head of Labor Relation US Navy, San Bruno Naval Construction Facility Problems with U.S.

Navy and Davis-Bacon are resolved – proof available upon demand.

Any problem related to Daniel West and workers comp. are resolved.

(3)

No. 90-710

FILED
DEC 13 1990
JOSEPH F. SPANIOL, JR.
CLERK

In the Supreme Court

OF THE

United States

OCTOBER TERM, 1990

ST. PAUL FIRE AND MARINE INSURANCE COMPANY,
Petitioner,

VS.

SUPERIOR COURT OF THE STATE OF CALIFORNIA
FOR THE CITY AND COUNTY OF SAN FRANCISCO,
Respondent.

Petition for Writ of Certiorari
to the Supreme Court of California

PETITIONER'S REPLY BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

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No. 90-710

In the Supreme Court

OF THE

United States

OCTOBER TERM, 1990

ST. PAUL FIRE AND MARINE INSURANCE COMPANY,
Petitioner,

VS.

SUPERIOR COURT OF THE STATE OF CALIFORNIA
FOR THE CITY AND COUNTY OF SAN FRANCISCO,
Respondent.

Petition for Writ of Certiorari
to the Supreme Court of California

PETITIONER'S REPLY BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

PRELIMINARY STATEMENT

Petitioner believes that its petition adequately meets the opposition of respondent-real parties in interest except for the ensuing discussion of two authorities of respondent-real parties' in interest authorities.[1]

[1] The parties have not changed from those listed in the petition. The identity of parents and subsidiaries of petitioner have not changed from those listed in the petition.

ARGUMENT

1. Respondent-real parties' in interest citation of *Cantrell v. Great Republic Insurance Co.* 873 F.2d 1249 (9th Cir. 1989) is inapposite.

Cantrell involved an action to collect ERISA benefits under 29 U.S.C. § 1132(a)(1)(b) but artfully pleaded as a state law claim. *Id.* p. 1252. State courts have concurrent jurisdiction of actions under § 1132(a)(1)(b) 29 U.S. Code § 1132(e)(1). The case does not, therefore, stand for the proposition that failure timely to remove vests the state court with jurisdiction of the subject matter of an action otherwise within the exclusive jurisdiction of the United States District Court. *Cantrell* is applicable, however, in its discussion of artful pleading, *Id.* p. 1252-1253, showing that the present action is really a claim under the Miller Act, 40 U.S.C. § 270.

2. Respondent-real parties' in interest citation of *Hunter v. United Van Lines* 746 F.2d 635 (9th Cir. 1984) is inapposite.

In *Hunter* the court held that where plaintiff had a Carmack Amendment claim in an amount smaller than the $10,000.00 jurisdictional limit provided by 28 U.S.C. § 1337, he could not lump that claim and allegedly pendent state law claims to obtain jurisdiction. *Id.* p. 649-642. Petitioner contends that all the claims are based on the Miller Act and subject to exclusive federal jurisdiction; *Hunter,* therefore, is not in point. The court in *Hunter* did indicate that the artful pleading doctrine applies and federal jurisdiction is applicable when federal law not only displaces state law, but also confers a federal remedy. *Id.* p. 642. This court has held that the Miller Act provides a federal cause of action and **the scope of the remedy as well as the substance of the rights** created thereby are matters of federal not state law. *F. D. Rich Co. v. United States for the Use of Industrial Lumber Company* 417 U.S. 116, 127, 40 L.Ed.2d 703, 94 S.Ct. 2157 (1974). Accordingly, the artful pleading doctrine apples, *Hunter v. United Van Lines* 746 F.2d 6735, 642 (9th Cir. 1984), or respondent-real parties in interest have alleged an outright federal claim arising in substance under the Miller Act. Cf. *Ingersoll-Rand Co. v. McClendon* ___ U.S. ___, ___ L.Ed.2d,

S.Ct. ___ (1990 U.S. Lexis 6121, decided December 3, 1990), holding that a state law claim for discharge to avoid paying ERISA benefits arises in substance under ERISA and that the state courts lack jurisdiction. Particularly compelling is the reasoning of the following paragraph of the case:

> McClendon argues that the pension plan is irrelevant to the Texas cause of action because all that is at issue is the employer's improper motive to avoid its pension obligations. The argument misses the point, which is that under the Texas court's analysis there simply is no cause of action if there is no plan. *Id.* pp. 14, 15.

In the present case, if there is no Miller Act bond, there is no cause of action, and the case hence arises under the Miller Act.

CONCLUSION

This court should grant certiorari and order the superior court to dismiss the case for lack of subject matter jurisdiction.

DATED: December 10, 1990

Respectfully submitted,

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